SUPREME COURT, U.S.
APR 9 - 2010

No. 09-771

In the Supreme Court of the United States

ACCEPTANCE INSURANCE COMPANIES, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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REPLY BRIEF OF PETITIONER ACCEPTANCE INSURANCE COMPANIES INC.

The Petition raises important issues regarding the Federal Circuit's approach in regulatory takings cases. The Petition demonstrates that in the underlying decision the Federal Circuit has moved in a direction contrary to this Court's realistic, flexible and practical approach to the analysis of takings claims. The government's Brief in Opposition denies the troubling aspects of the Federal Circuit's opinion and argues the case is not of sufficient significance to merit review by this Court. To the contrary, the case reveals the Federal Circuit developing doctrines of its own devise that have broad significance, especially in regulatory takings cases. This case affords the Court the opportunity to review the Federal Circuit's developing doctrines and provide more definite guidance in the area of regulatory takings.

I. Equating Entry Into a Regulated Industry with Extinguishment of Fundamental Property Rights.

The Federal Circuit held that because the Department of Agriculture's Risk Management Agency (RMA), had authority to approve or disapprove the sale of Petitioner's portfolio of crop insurance policies, Acceptance by definition had no property right in the disposition of that business. "Acceptance . . . did not possess an unfettered right to sell or otherwise transfer the policies, thus precluding the existence of a cognizable property interest." App. 17a-18a, 583 F.3d at 858. The rights to possess, use and dispose of property are fundamental. In the regulated industry context, any or all of those rights may be affected,

limited or conditioned to some degree or another, and thus are not "unfettered." If entirely "unfettered" is the standard in measuring property rights as the Federal Circuit now suggests, then one can never be said to have property rights whenever regulation touches upon those rights. This is inconsistent with this Court's precedent. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); *Cienega Gardens v. United States*, 331 F.3d 1319, 1331 (Fed. Cir. 2003) (rejecting the argument that government action in a "pervasively regulated industry" can never constitute a taking of private rights).

Plainly there is a distinction between limitations on a property right and the complete extinguishment of a property right. The Federal Circuit's approach does not recognize such a distinction and the court, therefore, does not examine the particulars of the regulatory framework, either under the *Lucas* or *Penn Central* tests, to see whether those who enter the field of regulation may justly be said to have lost a fundamental property right, and if so, under what circumstances. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1973). The analysis cannot be so oversimplified. A major portion of the nation's economy and private investment is in regulated industries. Those who invest in regulated industries should not be denied the ability to bring takings claims to protect their interests on the theory that they lose otherwise fundamental property rights by virtue of the regulation itself. When property rights are affected by regulation, a court must undertake a nuanced examination of the nature of the regulation,

its scope and its purpose, and how it was invoked in the particular circumstances in considering whether the owner of the property retains a compensable interest in the property. That is why this Court has emphasized that proper takings analysis is essentially an ad hoc factual inquiry. *Lucas*, 505 U.S. at 1015 (1992); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986).

This case raises the fundamental question of when and under what circumstances one loses a fundamental property right upon entry into a regulated industry. The government's brief does not squarely address this question, or even frankly acknowledge it, even though it immediately springs to the fore in light of the Federal Circuit's facile leap to the conclusion that the general regulatory authority of the RMA, which one assumes may curtail the right of disposition in *some* circumstances, extinguishes the right of disposition in *all* circumstances. The mere fact that regulation touches a right does not support the conclusion that the right is extinguished. Rather, regulation may be held to extinguish a fundamental property right only upon the kind of searching, ad hoc analysis that has informed this Court's takings jurisprudence for generations, such as that required by *Lucas* or *Penn Central*. A properly directed analysis would not support the Federal Circuit's conclusion that Acceptance's participation in the regulated crop insurance industry left it without any cognizable right to sell its business, regardless of circumstances. Indeed, circumstances determine expectations, and expectations help define the scope of the property right in question.

If entry into a regulated industry in and of itself can extinguish fundamental property rights, then this Court should define the analytical framework to be applied to reach that conclusion. Clearly, the Federal Circuit's superficial analysis, which takes regulated industry cases outside the purview of the Fifth Amendment any time regulation touches upon an asserted property right, leaves much to be addressed. The potential result is a near *per se* exception from takings liability in regulated industry cases, contrary to the Federal Circuit's own holding in *Cienega Gardens*. The government's Brief simply does not address the real issue, namely the clear need for a better analytical framework for determining the validity of takings claims in regulated industries.

II. The Assertion that it is Necessary to Pinpoint a Single, Discrete Act as Constituting the Taking.

The Federal Circuit applied a doctrine of its own making in declaring that it is necessary to pinpoint a single, discrete governmental act as constituting the taking. App. 12a-13a; 583 F.3d at 855. Even though the Federal Circuit explicitly stated this as a rule of law, the government argues that the court was only holding Acceptance to a concession made in oral argument or implied from the complaint. Resp. Br. at 5. In fact, the particulars of the takings claim had been clarified in the Court of Federal Claims, which acknowledged that the taking alleged encompassed a chain of events including the RMA's blocking of the proposed sale, the RMA's subsequent exercise of control over the policies and its redistribution of the policies to other crop insurers. App. 25a-26a; 84 Fed. Cl. at 113; see Pet. at 19-20.

The purported rule of law the Federal Circuit used allowed it to truncate the analysis of the operative chain of events, looking only at the first act of denying the transaction while ignoring the remainder of the sequence. This artificial division of plainly interrelated causes and effects allowed the court to ignore the fact that the RMA-orchestrated events necessarily and predictably resulted in the categorical taking and permanent loss of all of Acceptance's property interest in its crop insurance business, including the physical dispossession of the policies themselves.

As noted in the Petition, the "pinpoint" doctrine propounded by the Federal Circuit does not appear in this Court's takings precedents, but is rather a construct developed by the Federal Circuit. See Pet. at 20-22. The government does not contend otherwise. The Petition asks whether this doctrine can be squared with this Court's insistence that takings claims require flexible, realistic, ad hoc analysis. See Pet. at 20-21. The segmentation of connected events allowed the Federal Circuit to avoid the fact that the RMA rejected the sale so it could assert control over the policies during the state liquidation proceeding and redistribute them to other insurers in a setting that would insulate it from a feared risk of lawsuits by disgruntled insurance agents. Pet. at 21. The court's deliberate refusal to consider the full constellation of operative events by application of its pinpoint doctrine is neither logical nor realistic.

The rule of law developed and applied by the Federal Circuit does not have its genesis in any precedents of this Court, is the antithesis of realistic analysis, and opens the door to the denial of takings

claims based on the artificial displacement of clearly interrelated acts. As such, it is a doctrine that demands this Court's review. The government's argument that this case does not have significance beyond the narrow facts pled in the complaint is incorrect. The Federal Circuit has developed and applied a rule of law which is the polar opposite of a commonsense, realistic acknowledgement of the interrelatedness of events, and which has never been reviewed by this Court. By separating the bow from the arrow and the target, the reality of events is obscured and an artificial procedure is endorsed that inevitably will invalidate takings claims merely because they are based on an intrinsically interconnected chain of events instead of a single, discrete act. A doctrine with such obvious broad implications is worthy of this Court's consideration.

CONCLUSION

For the foregoing reasons, and those stated in Acceptance's Petition, the writ of certiorari should be granted.

Respectfully submitted,

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